SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 39

WILLIAM C. CHANDLER,

Petitioner,

vs.

WARDEN FRETAG

BRIEF ON MERITS FOR AND IN BEHALF OF

WILLIAM C. CHANDLER, PETITIONER

EARL E. LEMING,
508 Empire Bldg.,
Knoxville, Tennessee,
Counsel for Petitioner,

JAS. P. BROWN,
508 Empire Bldg.,
Knoxville, Tennessee,

CARL A. COWAN,
101½ Vine Ave.,
Knoxville, Tennessee,

WARREN R. WEBSTER,
502 Empire Bldg.,
Knoxville, Tennessee,

RUDOLPH V. MCKAMEY,
101½ Vine Ave.,
Knoxville, Tennessee,
Associate Counsel.

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BRIEF ON MERITS

Opinions Below

(a) Petitioner, William C. Chandler, here seeks review of a judgment of the Supreme Court of Tennessee (R. 31) and its unpublished "Opinion" thereon (R. 32 to 36) and it unpublished "Opinion On Petition To Rehear" (R. 41, 42) and final "Order Denying Petition To Rehear" (R. 42) denying him relief by habeas corpus from a judgment and sentence of life imprisonment as an habitual criminal (Pl. Ex. 2, R. 7, 10, 12) challenged as being in conflict with the due process clause of the 14th Amendment to the Constitution of the United States.

Jurisdiction

(b) The certiorari jurisdiction of this Honorable Supreme Court of the United States is invoked to review the judgment (R. 31) and "Opinion" thereon (R. 32 to 36) and

"Opinion On Petition To Rehear" (R. 41, 42) and final "Order Denying Petition To Rehear" (R. 42) of the Supreme Court of Tennessee, the highest Court in the State. (Const. of Tenn., Art. 6, Secs. 1 and 2) by reason of Title 28 U. S. C. A., Sec. 1257, Par. (3), providing review by certiorari of final judgments or decrees rendered by the highest court of a state where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States. Petitioner claims that he was denied procedural due process under the 14th Amendment to the Constitution of the United States, on the grounds that he had no pre-trial notice of the habitual criminal accusation against him; that he was first orally advised of the habitual criminal accusation when he appeared for trial on a housebreaking and larceny indictment carrying a sentence of from 3 to 10 years; that when advised of the oral habitual criminal accusation he demanded counsel which was refused by the court; that the judgment is ambiguous and contradictory; that the trial record fails to show the alleged prior convictions required to sustain his conviction as an habitual criminal, and that the trial record is insufficient to show petitioner or a reviewing court by what authority he is imprisoned under a life sentence; that the recital in the judgment that he appeared with counsel is false.

The Supreme Court of Tennesse entered its final "Order Denying Petition To Rehear" (R. 42) on April 27, 1953, and within 90 days thereafter, Petitioner obtained from the Honorable Associate Justice, Tom C. Clark, an "Order Extending Time To File Petition For Writ Of Certiorari" to and including September 24, 1953 (R. 43). Petitioner filed his Petition For Writ of Certiorari on September 23, 1953, and the Writ of Certiorari to the Supreme Court of the State of Tennessee was granted April 5, 1954.

Constitutional and Statutory Provisions Involved

(c) Here, directly involved, is the due process clause of the 14th Amendment to the Constitution of the United States (Appendix A); and the Habitual Criminal Act of Tennessee, Pub. Acts of Tenn., 1939, Ch. 22, Secs. 1 to 8; Williams Code of Tennessee, Supp. Secs. 11863.1 to 11863.8 (Appendix B).

Questions Presented For Review

(d) The substantial federal questions presented for review originated by Petition For Habeas Corpus (R. 1 to 5) with copy of indictment and judgment thereon annexed as exhibits (Pl. Ex. 1, 2; R. 5, 6, 7, 8) filed in the Circuit Court of Knox County, Tennessee, preserved upon appeal to the Supreme Court of Tennessee by eleven Assignments of Error (R. 28, 29), summarized and stated in the Petition For Writ Of Certiorari, in questions as follow:

1. Whether under the 14th Amendment Petitioner was entitled to pre-trial pleaded notice, or warning, of the habitual criminal accusation against him?

2. Whether the Tennessee Supreme Court's holding that Petitioner "was not entitled to notice that he would be prosecuted as an habitual criminal other than the indictment for housebreaking and larceny", can stand under procedural due process provisions of the 14th Amendment?

3. Whether the State Court's holding that Petitioner "*was not entitled to notice that he would be prosecuted as an habitual criminal other than the indictment for housebreaking and larceny, since the statute itself is notice to an accused who is being tried for his fourth felony*", presumes guilt without fair notice or fair trial, in violation of **"due process" under the 14th Amendment?**

4. Whether Petitioner was denied "due process" under the 14th Amendment by the State Court's holding that he

waived his right to counsel on the habitual criminal accusation, by appearing without counsel upon the housebreaking and larceny indictment, despite the State's admission that he had no pre-trial notice of such accusation, and that he requested and was denied opportunity to obtain counsel on such accusation, when first advised by the Court of the accusation?

5. Whether an oral habitual criminal accusation, made for the first time, when Petitioner appeared for trial without counsel on a housebreaking and larceny, his request for, and denial of opportunity to obtain counsel on such accusation, a summary trial thereon and a sentence to life imprisonment as an habitual criminal is violative of procedural due process under the 14th Amendment?

6. Whether under the "due process clause" of the 14th Amendment the State Court erred in sustaining as valid, the judgment of life imprisonment as an habitual criminal, rendered on an oral information in circumvention of the grand jury, ambiguous and contradictory on its face, the judgment and trial record being completely silent in recitals of prior felony convictions, the Court where rendered, their number, grade or sufficiency to show Petitioner or a reviewing court upon what offenses or by what authority his liberty is taken?

7. Whether under the facts of this case Petitioner was denied a fair trial consistent with procedural due process of law under the 14th Amendment to the Constitution of the United States?

Statement of the Case

(e) Petitioner, William C. Chandler, in the Circuit Court of Knox County, Tennessee, filed a Petition for Writ of Habeas Corpus (R. 1 to 5) with certified copies of the indictment and challenged judgment annexed as exhibits (R. 5,

6, 7,) on the ground that his trial, conviction, judgment and sentence to life imprisonment as an habitual criminal in the Criminal Court of Knox County, Tennessee, was had in violation of the "law of the land" under the Constitution and Statutes of Tennessee, and in violation of "procedural due process of law" under the 14th Amendment to the Constitution of the United States.

The Habitual Criminal Act (Pub. Acts of Tenn. 1929, Ch. 22, Secs. 1 to 8; Williams Tenn. Code, Supp. Secs. 11863.1 to 11863.8) hereto shown in (Appendix "B"), provides in substance that one on trial for a fourth felony, who has previously been convicted on different occasions of three certain designated felonies, above the grade of petit larceny, two of which rendered him infamous, may, without being indicted as an habitual criminal, be orally accused, tried, convicted and sentenced to life imprisonment as an habitual criminal. Judgments of such prior convictions from this State, any other State, country or territory in the same name as the accused is made prima facie evidence that such accused is one and the same person. Under Section 4 of the Act, the grand jury may indict one as an habitual criminal, but if the grand jury fails to indict an alleged fourth offender as an habitual criminal, the State may orally accuse, try and convict such accused as an habitual criminal.

Petitioner, an ignorant colored man, was indicted on March 10, 1949 for a $3.00 housebreaking and larceny from a business house (Pl. Ex. 1; R. 1, 5, 6, 10) carrying a sentence of from 3 to 10 years. He was not indicted as an habitual criminal. He was released on a $1,000 bond pending trial (R. 21), and appeared for trial on May 17, 1949 (Pl. Ex. 2, R. 7, 10, 11, 21) without an attorney (R. 13, 14, 15, 17, 21, 22) intending to plead guilty to the housebreaking and larceny indictment (R. 2, 14). He had no notice of the habitual criminal accusation against him (R. 14, 15, 16, 17,

ments of prior convictions or other evidence was presented to the jury on the oral habitual criminal accusation, as required by Tenn. Code Sec. 11738 (Appendix "C") and held in *Knowles* v. *State*, 155 Tenn. 181 upon a plea of guilty; although Prosecuting Attorney General Greenwell, the State's only witness on the hearing, instead of producing the supposed prior judgments of conviction recollected to the contrary "testifying wholly from memory" (R. 21, 22) and it was his impression Mr. Line or Mr. Cate (Criminal Court Clerks) read them (R. 21, 22).

The Trial Court record consisting of the housebreaking and larceny indictment (Pl. Ex. 1, R. 5, 10) and judgment No. 7139 (Pl. Ex. 2, R. 7, 11, 12) contains no recital of prior judgments of conviction. Except for the testimony of Attorney General Greenwell (R. 21, 22, 23) the State relied entirely upon the presumption of regularity of judgments, despite the fact that the Habeas Corpus Petition alleged no prior judgments were submitted to the jury (R. 2, Par. 6).

All of Petitioner's witnesses testified that the Court did not read a written charge to the jury, as provided by Tenn. Code Secs. 11749, 11750, 11751 (Appendix "D"), and that the jury did not leave the jury box to consider their verdict (R. 13, 15, 16, 18, 20) fully sustained and admitted by the only state witness, Attorney General Greenwell (R. 21, 22, 23), who also stipulated that no written charge was filed with the Court papers (R. 21) as required by Tenn. Code Sec. 11749 (Appendix "D"), and he was not sure the Court read the Habitual Criminal Act (R. 23) and stated "The Judge never writes a charge where the State and the defendant have agreed, he generally only makes the statement as to what they have agreed on" (R. 23).

All witnesses upon the habeas corpus hearing agreed that the trial proceedings took from 5 to 10 minutes (R. 11, 18,

20) although Attorney General Greenwell testified "If you count the time defendant and his brother talked around about it, I would say 20 or 30 minutes—after we got down to business it probably took about 10 minutes" (R. 22).

The Supreme Court of Tennessee specifically held that Petitioner "was not entitled to notice that he would be prosecuted as an habitual criminal other than the indictment for housebreaking and larceny, since the statute itself is notice to an accused who is being tried for his fourth felony." (R. 34, 36, 42) and further held that Petitioner "waived his right to counsel" (R. 34) despite Prosecuting Attorney General Greenwell's testimony, as follows:

> "William Chandler was indicted by the grand jury on or about March 10, 1949, at that time he was out on bond. The East Tennessee Bonding Company had made bond for $1,000.00 on housebreaking and larceny. He was duly indicted on March 10th and thereafter the case was set for hearing on May 17, 1949. The case came up on the Docket, as I recall—I am testifying wholly from memory—he said he wanted the case put off *as he was advised by the Court that he was being tried as an habitual criminal in addition to housebreaking and larceny. He asked that the case be put off so he could get a lawyer* and Judge Bibb told him he had had since January up to May to get a lawyer. *Judge Bibb has a set rule that he does not appoint counsel for any defendant that is able to make bond.* He says that if they are able to hire a bondsman, they are able to get a lawyer, and he does not appoint one." (R. 21) (Emphasis Supplied)

The State Admits: That Petitioner was not indicted as an habitual criminal; that he had no written notice of the habitual criminal accusation; that he had no notice of the oral habitual criminal accusation until he appeared in Court for trial on the 3 to 10 year indictment for housebreaking and larceny; that when first advised of the habitual criminal

accusation he promptly requested and was denied opportunity to obtain counsel on such charge; that he was summarily put to trial upon the oral habitual criminal accusation without an attorney; that the judgment recital that he appeared with counsel is false; that the court did not give a written charge to the jury, nor file a written charge with the papers in the case pursuant to statute; that the trial proceedings lasted from 5 to 10 minutes; that the court did not read the habitual criminal act to the jury (R. 21, 22, 23).

In the Statement Of The Case (R. 29, 30) Counsel for Warden Fretag sums up the evidence as follows:

> "Mr. Greenwell, Assistant District Attorney General, testified in behalf of Defendent. His testimony was substantially the same as that of Petitioner and his witnesses except that Greenwell testified that Petitioner pleaded guilty to being an habitual criminal and that evidence of three prior convictions was presented to the Jury." (R. 30)

Petitioner submits that the trial court not only denied him counsel and forced him to trial on the oral habitual criminal accusation but directed the jury to return a contradictory and ambiguous verdict of guilty, upon which the Court imposed the sentence of life imprisonment, as shown by testimony of Attorney General Greenwell, as follows:

> "The Judge didn't furnish the Jury with a written charge as he does in cases on trial, but he did explain to them the habitual criminal Act and penalty, as well as house breaking and larceny, and charged them that if, after hearing his plea of guilty to the two charges, if they agreed to that he was to take three years in house-breaking and larceny, and if they agreed to hold up their right hands; and if he was guilty as an habitual criminal also to hold up their right hands, and so that was their verdict, he was found guilty of being an

habitual criminal and of housebreaking and larceny." (R. 21, 22)

Under such directions the challenged judgment (Pl. Ex. 2, R. 7, 10, 12) discloses that the jury fixed petitioner's sentence on the housebreaking and larceny at 3 years, the minimum for such charge, and under the recital that they found him guilty as an habitual criminal, the court sentenced him to life imprisonment.

Law and Authorities

(1) Petitioner was entitled to pre-trial pleaded notice of the habitual criminal accusation against him. *Cole, et al* v. *State of Arkansas*, 333 U. S. 196, 68 S. Ct. 514; *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 ALR 527.

Petitioner was entitled to fair notice of the real accusation against him. In Re *Oliver*, 333 U. S. 257; *Smith* v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859; *Hauck* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116.

Petitioner was entitled to counsel on the habitual criminal accusation against him. *Uveges* v. *Commonwealth of Pennsylvania*, 335 U. S. 437, 69 S. Ct. 184, 93 L. Ed. 127; *Gibbs* v. *Burke*, 337 U. S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686, Annotated; even on a plea of guilty, *Von Moltke* v. *Gillies*, 332 U. S. 708, 68 S. Ct. 316, 92 L. Ed. 316; *De Meerleer* v. *Michigan*, 329 U. S. 663, 67 S. Ct. 596, 91 L. Ed. 584; *Rice* v. *Olson* 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367, Anno. 20 ALR 2d 1346; *Hauck* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116; *White* v. *Ragen*, 324 U. S. 760, 65 S. Ct. 978; *Hawk* v. *Mayo*, 324 U. S. 42, 65 S. Ct. 517, 89 L. Ed. 739; *Tompkins* v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370; *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363; *Smith* v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859.

Petitioner was entitled to a trial record sufficient in re-

cital of prior convictions, the court where rendered, their number, grade and sufficiency to show Petitioner or a reviewing court upon what offenses or by what authority his liberty is taken. *Commonwealth ex Rel Arnold* v. *Ashe*, (1945) 156 Pa. Super 451, 40 A 2d 875.

Under the facts of this case, Petitioner was tried, convicted and sentenced to life imprisonment as an habitual criminal in a trial proceeding lacking in fundamental fairness, and contrary to procedural due process under the 14th Amendment to the Constitution of the United States, as announced in cases as follow:

Cole, et al v. *State of Arkansas*, 333 U. S. 196, 68 S. Ct. 514; In Re *Oliver*, 333 U. S. 257, 68 S. Ct. 499; *Gibbs* v. *Burke*, 337 U. S. 773, 93 L. Ed. 1686, 69 S. Ct. 1247; *Uveges* v. *Commonwealth of Pennsylvania*, 335 U. S. 437, 93 L. Ed. 127, 69 S. Ct. 184; *Bute* v. *People of Illinois*, 333 U. S. 640, 68 S. Ct. 763; *Von Moltke* v. *Gillis*, 332 U. S. 708, 92 L. Ed. 316, 68 S. Ct. 316; *De Meerleer* v. *Michigan*, 329 U. S. 663, 91 L. Ed. 584, 67 S. Ct. 596; *Hawk* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116; *Rice* v. *Olson*, 324 U. S. 786, 89 L. Ed. 1367, 65 S. Ct. 989; *House* v. *Mago*, 324 U. S. 42, 89 L. Ed. 739, 65 S. Ct. 517; *White* v. *Ragen*, 324 U. S. 760, 65 S. Ct. 978; *Tomkins* v. *Missouri*, 323 U. S. 485, 65 S. Ct. 370; *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363; *Weiler* v. *United States*, 323 U. S. 606, 65 S. Ct. 548, 89 L. Ed. 495, 156 A. L. R. 496; *Betts* v. *Brady*, 316 U. S. 455, 62 S. Ct. 1252; *Smith* v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859; *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680; *Johnson* v. *Zerbst*, 304 U. S. 485, 58 S. Ct. 1019, 82 L. Ed. 1461; *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158; *United States ex rel Hall* v. *Ragen*, 60 F. Supp. 820.

Petitioner did not waive his right to counsel, because it is admitted that he requested and was denied counsel.

The above State Constitutional provisions in the Declaration of Rights, were so sacred to the Tennessee Constitutional fathers, that in Article 11, Sec. 16, of the Constitution of Tennessee we find:

> "The declaration of right, hereto prefixed, is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained is excepted out of the general powers of the government, and shall forever remain inviolate."

The following Tennessee Statute, also contemplates fair notice to the accused:

> "Tennessee Code Sec. 11624. Statement of offense. "The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are such words as "force and arms" or "contrary to the form of the statute" necessary."

Since Petitioner's conviction, and after holdings by the Supreme Court of Tennessee in *State ex rel Grandstaff* v. *Gore*, 182 Tenn. 94; and *McCummings* v. *State*, 175 Tenn. 309, that one need not be indicted as an habitual criminal to sustain such conviction, the Legislature of Tennessee evidenced its idea of the sacredness of formal pleadings and notice to the accused by modifying in the 1950 Supplement to the Code of Tennessee, Section 11863.5 as follows:

> "11863.5. Indictment to charge habitual criminality.—An indictment or presentment which charges a person, who is an habitual criminal as defined in this

chapter, with the commission of any felony specified in sections 10777, 10778, 10788, 10790, 10797 of the code, or a crime for which the maximum punishment is death, shall, in order to sustain a conviction of habitual criminality, also charge that he is such habitual criminal. Every person so charged as being an habitual criminal shall be entitled upon his motion therefor filed in the cause at any time prior to trial, to demand and to have from the state, a written statement of the felonies, prior convictions of which form the basis of the charge of habitual criminality, setting forth the nature of each such felony and the time and place of each such prior conviction. He shall not, without his consent, be required to go to trial within twenty days from and after the time when such statement was supplied to him or his counsel of record. (1939, Ch. 22, sec. 5, modified)"

Petitioner was entitled to counsel on the habitual criminal accusation, and in addition to the right to counsel provided in Article 1, Sec. 9 of the Constitution of Tennessee, heretofore quoted, the right is guaranteed by the following statutory provisions:

"Tenn. Code Sec. 11733. Entitled to counsel.—Every person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for his defense, as well as to facts as to law."

"Tenn. Code Sec. 11734. To be appointed by court.—If unable to employ counsel, he is entitled to have counsel appointed by the court."

"Tenn. Code Sec. 11547. Notice of charge, and of right to counsel.—When the defendant is brought before a magistrate upon arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the offense with which he is charged, and of his right to aid of counsel in every state of the proceedings."

"Tenn. Code Sec. 11548. Time to send for counsel.—The magistrate shall allow the defendant a reasonable

time to send for counsel, and, if necessary, shall adjourn the examination for that purpose."

We call to the attention of the Court that in Petitioner's case all of the foregoing constitutional and statutory mandates were ignored, and their violation by the State Court held not to violate due process under the laws of Tennessee or the 14th Amendment to the Constitution of the United States. We suggest that the State courts failure to comply with statutory and constitutional provisions was also a denial of equal protection to petitioner under the 14th Amendment.

Petitioner was entitled to notice of the habitual criminal accusation against him and a trial record sufficient to advise him or a reviewing court of the prior convictions, their number, grade or sufficiency to support the sentence of life imprisonment.

This question was raised in a multiple offender case in *Commonwealth ex rel Arnold* v. *Ashe*, (1945), 156 Pa. Super 451, 40 A 2nd 875, from which we quote:

"The order of the court below is fully sustained by the well considered opinion of Judge Egan. It is affirmed on that opinion.

We recognize that the act of April 29, 1929, P. L. 854 Sec. 921 et seq., which was in force when the sentences were imposed on relator under indictments to Nos. 742 and 743 June Sessions, 1934, provides in section 5 that a person need not be formally indicted and convicted as a previous offender in order to be sentenced for a second or subsequent offense under that act; and that the case of *Com. ex rel Cody* v. *Smith*, 327 Pa. 311, 193 A 38, holds that it is not necessary that the sentence imposed for a second offense should therein state specifically that it was increased by reason of the provisions of the act of 1929, supra. Nevertheless, *we are of opinion that there should be some proceeding of record by which it appears that the per-*

son sentenced was the same person who had previously been convicted, within five years, of one of the crimes specified in section 1 of the Act (now section 1108(a) of the Penal Code of 1939, 18 P. S. Sec. 5108 (a). And the term "conviction" is used in the act in its legal technical sense, as meaning "the ascertainment of guilt of the accused and judgment thereon by the court, implying not only a verdict but judgment or sentence thereon": *Com.* v. *Minnich* 250 Pa. 363, 367, 95 A. 565, 566, LRA 1916 B, 950; *Com.* v. *Vitale*, 256 Pa. 548, 550, 95 A 723. The defendant has a right to know at the time of his sentence that it has been increased because of his prior conviction of a crime falling within the category stated in the Act, within the previous five years, as defined in said Act, sec. 3 of the Act of 1929, sec. 1108(c) of the Penal Code of 1939, 18 P. S. Sec. 5108(c)," *so that he can appeal if he denies that he was the person alleged to have been previously convicted*, or that he was so convicted within the previous five years as defined in the Act. *The facts on which the doubling of the term of sentence depends should not rest in the undisclosed knowledge of the Court but should appear plainly of record somewhere so that the authority for the increased sentence is clearly established.*" (Emphasis supplied.)

Commonwealth ex Rel Arnold v. *Ashe*, 156 Pa Super 451, 40 A 2d 875.

In Petitioner's case the indictment (Pl. Ex. 1, R. 5, 6, 10) and judgment (Pl. Ex. 2, R. 7, 10, 12) constitute the trial court record, and fail to reveal the alleged prior convictions, or whether petitioner had three prior convictions above the grade of petit larceny or within the enumeration of the habitual criminal act (Appendix "B"). The State for Warden Fretag relied upon the regularity of judgments upon the habeas corpus hearing, and has effectively hidden its judicial tracks under the judgment and sentence of life imprisonment. The State concedes that the judgment recital that Petitioner appeared with counsel is false, but

still relies upon the alleged regularity of said judgment.

Although Petitioner alleged in his habeas corpus petition that no "judgments of prior conviction or other evidence was submitted to the jury on the Habitual Criminal Charge" (R. 3, Par. 6) the State chose to rely upon the oral recollection of its one and only witness, Attorney General Greenwell (R. 21, 22, 23) and the presumed regularity of judgment.

Petitioner's trial, upon an oral accusation that he was an habitual criminal, made for the first time when he appeared for trial on a 3 to 10 year housebreaking and larceny charge, a summary trial as an habitual criminal after he had requested and been denied counsel, and a sentence of life imprisonment as an habitual criminal was a fundamentally unfair trial proceeding violative of the 14th Amendment to the Constitution of the United States.

Petitioner's case is similar to the situation discussed by this Court in *Hauck* v. *Olson*, 326 U. S. 271, 66 S. Ct. 116, in the following language, to wit:

> "In state prosecutions a conviction on a plea of guilty, obtained by trick, Smith v. O'Grady, 312 U. S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859, or, after refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, Williams v. Kaiser, 323 U. S. 471, 472, 65 S. Ct. 363, 364, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See Tomkins v. Missouri, 323 U. S. 485, 65 S. Ct. 370; Cochran v. Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. Powell v. Alabama, supra, 287 U. S. 52, 58, 53 S. Ct. 58, 60, 77 L. Ed. 158, 84 A. L. R. 527; House v. Mayo, 324 U. S. 42, 65 S. Ct. 517. Compare Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; Glasser v.

United States, 315 U. S. 60, 69, 70, 62 S. Ct. 457, 464, 465, 86 L. Ed. 680. When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. White v. Ragen, 324 U. S. 760, 65 S. Ct. 978. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. Williams v. Kaiser, 323 U. S. 471, 472, 65 S. Ct. 363, 364; Tomkins v. Missouri, supra."

Hawk v. *Olson*, 326 U. S. 271, 66 S. Ct. 116.

Now, in Petitioner's case, why did the State authorities not advise him of the oral habitual criminal accusation until he appeared for trial on the 3 to 10 year housebreaking and larceny indictment? Was it a trick? Why did the trial court refuse his proper request for counsel after he was advised of the habitual criminal accusation? (R. 21, 22, 23). Why did the Court force the Petitioner to trial on the habitual criminal accusation after denial of his request for counsel?. (R. 21, 22, 23). Why did the Court not give a written charge to the jury? Was it because the habitual criminal charge was a small offense, or because the court was in a hurry, or that the rights of the accused was of no interest to the judicial authorities of the sovereign state of Tennessee? Was it because the Attorney General was under no obligation to protect the rights of an accused habitual criminal in the Courts of Tennessee? Was it because there was no proper judicial guidance on the part of the Court or of the State prosecuting authorities? Was it because of Petitioner's position in the strata of society? Was it because Petitioner needed no guidance or counsel? Was it because his case had been pre judged by the Court and the Prosecuting Officials of the State of Tennessee? Was it because such proceedings are consistent with the

statutes and constitutional provisions of Tennessee, except for those whom the Attorney-General chooses to charge as habitual criminals, without the intervention of a grand jury, a procedure required in all cases except habitual criminals?

Why is there no record in the trial court or in the record of Petitioner's habeas corpus proceeding to advise this court of the prior offenses upon which his judgment of conviction and sentence are based? Why is there no record to show that such alleged prior convictions were above the grade of petit larceny as required by Tenn. Code Section 11868.1 (Appendix "B") and why is there no record to show that such prior convictions, if any, are within the enumerated sections of the Code of Tennessee mentioned in the habitual criminal act. (Appendix "B")

Are the foregoing questions adequately answered by the testimony of Attorney General Greenwell (R. 21, 22, 23), the only evidence offered by the State in behalf of defendant Warden Pretag?

Why did the trial Court say to the jury "if they agreed to that he was to take three years in housebreaking and larceny, and if they agreed to hold up their right hands; and if he was guilty as an habitual criminal also to hold up their right hands," and so that was their verdict, he was found guilty of being an habitual criminal and of housebreaking and larceny," according to Attorney General Greenwell (R. 22). Does such a proceeding show a considered judgment of conviction by peers of the accused, or does it show a judgment and verdict rendered under the direction and will of the trial court?

In *Johnson* v. *Zerbst*, this Court in construing the requirements of the Sixth Amendment to the Constitution of the United States, which is similar in its requirements to

Article 1, Section 9, of the Constitution of Tennessee, as quoted on *Page 12* of this brief, said:

> "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life and liberty. *A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing Counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.*"
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> *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. ed. 1461.

Petitioner does not say that the 6th Amendment to the Constitution of the United States, as construed in *Johnson v. Zerbst*, is necessarily included in the 14th Amendment to said Constitution, but he does say that when the State of Tennessee included Article 1, Section 9 in the Declaration of Rights in its Constitution it included everything stated in the Sixth Amendment to the Constitution of the United States, and a violation thereof is within the protection of the 14th Amendment to the Constitution of the United States. (See Art. 1, Sec. 9 *typewritten Page 12*, of this brief).

The judgment recitals as to plea, read as follows:

"Came the Attorney General for the State, also defendant in custody, having counsel present, and on hearing the indictment read for plea thereto, defendant says that he *is guilty* of Housebreaking and Larceny and

also that he *is guilty of being an habitual criminal*" . . . (Pl. Ex. 2, R. 7, 10, 12).

It is admitted that Petitioner was not indicted as an habitual criminal (Pl. Ex. 1, R. 5, 6, 10, 22) so to sustain the judgment recital that he pleaded guilty as an habitual criminal, we must go outside the trial record, into thin air, unless we proceed entirely upon inference or supposition based entirely upon the judgment recital. The iniquity in any accusation not showing in the record, is that an accused may be deprived of his liberty in a "star chamber" proceeding, without judicial safeguards, and trial errors or deprivation of constitutional rights may be hidden behind the regularity ordinarily accorded to judgments.

Is a judgment, admittedly false, in its recital that Petitioner came, "having counsel" (R. 21, 22) entitled to credit in its recital that he pleaded "guilty of being an habitual criminal" (Pl. Ex. 2, R. 7, 10, 12) when it is necessary to go outside the trial record to show that he was so accused? (R. 22)

We note that the judgment (Pl. Ex. 2, R. 7, 10, 12) says that "upon their oaths the jurors say: they find the defendant guilty of housebreaking and larceny as charged and fix his punishment at 3 years confinement in the State Penitentiary and also find him guilty of being an habitual criminal. It is therefore the judgment of the Court, upon the verdict of the jury, that the defendant for the offense of which he stands convicted, shall be committed as an Habitual Criminal to the State Penitentiary for the remainder of his natural life." . . . (Pl. Ex. 2, R. 7, 10, 12)

Since the Jury returned a verdict of 3 years, the minimum for housebreaking and larceny, and found Petitioner guilty of being an habitual criminal, upon which the Court sentenced him to life imprisonment, what was the Court's instruction? Under the Habitual Criminal Act, *Williams*

Tenn. Code Supp. Sec. 11863.6 (Appendix "B") the jury could not fix a minimum sentence of 3 years on the housebreaking and larceny if petitioner was an habitual criminal, and on the other hand if the jury did intend to fix a minimum and maximum of 3 years on the housebreaking and larceny it would be an acquittal of the habitual criminal accusation. Yet this judgment was, under the facts of this case, peculiarly under the control and direction of the Trial Court, and if the judgment evidences the nature of the oral instruction to the jury, then evidently the trial court and the jury were both confused. (R. 21, 22, 23).

Summary of Argument

(b) Petitioner says that he has been imprisoned under the challenged judgment and sentence of life imprisonment (Pl. Ex. 2, R. 7, 10, 12) from May 17, 1949 to the present 1954; that he has fully served the 3 years imposed by the jury for housebreaking and larceny; that so much of the said judgment as found him guilty as an habitual criminal and sentenced him to life imprisonment as an habitual criminal, upon an oral accusation, his trial and conviction and sentence, after having demanded and been denied counsel, is void, and having served more than three years he is entitled to his freedom. Further, that the jury fixed his maximum sentence at 3 years, and that the judgment recital that he was an habitual criminal and subject to sentence of life imprisonment as an habitual criminal rendered said judgment void for contradiction and ambiguity, unsupported by accusation in the trial record, all in contravention of the 14th Amendment to the Constitution of the United States.

Petitioner was originally indicted for housebreaking and larceny at the March Term, 1949 of the Grand Jury for Knox County, Tennessee, a charge carrying a 3 to 10 year sentence. (Pl. Ex. 1, R. 5)

He was released on a $1,000.00 bond (R. 21) and appeared for trial on May 17, 1949 (Pl. Ex. 2, R. 7, 10) without an attorney (R. 3, Par. 6) also (R. 13, 14, 15, 17, 21, 22) intending to plead guilty to the housebreaking and larceny indictment (R. 2, 14) and when he appeared for trial he was for the first time advised that he would also be tried as an habitual criminal and subject to life imprisonment (R. 14, 15, 16, 17, 18, 20, 21, 22) upon which he promptly asked for opportunity to obtain an attorney, which request was denied by the trial court (Pl. Ex. 1 to 5; R. 2, 14, 16, 21, 22) with the suggestion that he consult with members of his family on his course of action, and he was advised that all he could do was plead guilty (R. 17). Petitioner was summarily put to trial on the housebreaking and larceny indictment and on the oral habitual criminal accusation (R. 21, 22) and sentenced to life imprisonment as an habitual criminal.

So far as Counsel for Petitioner has been able to determine, unwritten accusations are unknown to Anglo-Saxon or Common Law pleadings. No civil action can be instituted in the State of Tennesse without written pleadings, although, pleadings in the Justice of the Peace Courts or Courts of General Sessions are often in-artfully phrased they do indicate the subject matter involved.

So far as Counsel for Petitioner has been able to determine no offense or accusation except that one is a subsequent offender may be charged in the State of Tennessee except by indictment, presentment, or impeachment.

The Supreme Court of Tennessee said (R. 34) "As to being entitled to counsel, he would be entitled to have counsel on the charge for which he stood indicted, namely, housebreaking and larceny, *but he would not necessarily be entitled to notice that he would be tried on the offense of habitual criminal since the Statute is itself notice to an*

accused who is being tried for his fourth felony." (R. 34)

To the above statement of the Supreme Court of Tennessee we say that every statute on the books is notice of a possible accusation, but the accusation cannot be sustained without a formal charge that one has brought himself within the terms of the statute. The First Degree Murder statute is notice to every one that he may be so charged, providing he brings himself within the terms of the statute. But an indictment for voluntary or involuntary manslaughter will not sustain a conviction of murder in the first degree.

Petitioner says that the Courts of Tennessee and particularly the Supreme Court of Tennessee has confused notice of the law as shown by the statutes of the State with notice to the accused of the particular statute he is accused of violating. All persons are charged with knowledge of the law, but no person is charged with knowledge that the accusatory authority of the State has been invoked upon a particular charge until the accused is formally advised of the accusation, by indictment or otherwise. And Petitioner says that oral accusations as the basis of prosecution have never been sanctioned by the law of the land in the Common Law procedures as established in the United States, so far as he has been able to determine.

The Relief to Which Petitioner Is Entitled

(i) Petitioner is entitled to immediate release from the Tennessee State Penitentiary at Petros, Tennessee, because he has served more than three years, the sentence imposed by the jury upon the housebreaking and larceny indictment, which sentence the Petitioner did not challenge in this proceeding. This Court should vacate and void the sentence of life imprisonment because same was rendered in violation of due process under the 14th Amendment to the Constitution of the United States, because Petitioner had no pleaded,

or any, notice of the habitual criminal accusation against him, and because he requested, did not waive, and was denied counsel on such charge, and because there are no record recitals of prior convictions, their grade, number or sufficiency to show petitioner or a reviewing court by what authority he is held, and because his trial, judgment and conviction and sentence were wanting in fundamental fair trial procedures under the 14th Amendment to the Constitution of the United States.

APPENDIX "A"

Constitution of the United States, Amendment 14, Section 1

Citizenship; due process; equal protection of laws. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "B"

Williams Code of Tennessee
Habitual Criminals

Section
11863.1 Habitual Criminal Defined.
11863.2 Sentence.
11863.3 Pardoning power not impaired.
11863.4 Charge of being habitual criminal.
11863.5 Indictment.
11863.6 Verdict.
11863.7 Evidence of prior convictions.
11863.8 Provisions severable.

11863.1 Habitual Criminal Defined.—Any person who has either been three times convicted within this state of felonies, two of which, under section 11762 of the Code of Tennessee, rendered him infamous, or which were had under sections 10777, 10778, 10790 and 10797 of said code, or which were for murder in the first degree, rape, kidnapping for ransom, treason or other crime punishable by death under existing laws, but for which the death penalty was not inflicted, or who has been three times convicted under the laws of any other state, government or country of crimes, two of which, if they had been committed in this state, would have rendered him infamous, or would have been pun-

ishable under said sections 10777, 10778, 10788, 10790 and 10797 of said code, or would have been murder in the first degree, rape, kidnapping for ransom, treason or other crime punishable by death under existing laws, but for which the death penalty was not inflicted, shall be considered, for the purposes of this act, and is hereby declared to be an habitual criminal, provided that petit larceny shall not be counted as one of such three convictions but is expressly excluded, and provided further that each of such three convictions shall be for separate offenses, committed at different times, and on separate occasions. (1939, ch. 22, sec. 1.)

11863.2 Sentence.—When an habitual criminal, as defined in section 1 (11863.1) of this act, shall commit any of the felonies as defined in sections 10777, 10778, 10788 and 10797 of the Code of Tennessee, or any other felony within this state, which under section 11762 of the Code of Tennessee would render him infamous upon conviction, other than murder in the first degree, kidnapping for reason (ransom), rape, treason, or other crime punishable by death under existing laws, or shall commit murder in the first degree, kidnapping for reason, (ransom), rape, treason, or other crime punishable by death under existing laws, and upon conviction therefor the death penalty is not imposed as now provided by law, he shall, in either case, upon conviction, be sentenced as an habitual criminal, and his punishment shall be fixed at life in the penitentiary, and such offender shall not be eligible to parole, either as provided in sections 11767 through 11777 of the "Code of Tennessee or in sections 11797 (1) through 11797 (6) (11802.1-11802.3) of said Code, nor shall said sentence be reduced for good behavior, for other cause, or by any means, nor shall the same be suspended. (1939, ch. 22, sec. 2).

11863.3 Pardoning Power Not Impaired.—Nothing herein shall be construed as seeking or tending to impair the pardoning power of the governor. (1939, ch. 22, sec. 3.)

11863.4 Charge of Being Habitual Criminal.—When an habitual criminal, as defined in section 1 (11863.1) of this act, is charged, by presentment or indictment, with the commission of any felonies as defined in section 10777, 10778,

10788, 10790 and 10797 of the Code of Tennesse or any other felony, conviction for which will render him infamous under section 11762 of the Code of Tennessee or for which the maximum punishment is death, he may also be charged therein with being an habitual criminal, as defined in section 1 (11863.1), hereof, or may be charged only with the commission of such felony but in either case, shall, upon conviction, be sentenced and punished as an habitual criminal, as in this act provided. (1939, ch. 22, sec. 4)

11863.5 Indictment.—An indictment or presentment which charges a person who is an habitual criminal, as defined in section 1 (11863.1), hereof, with the commission of any felony as defined in sections 10777, 10778, 10788, 10790 and 10797 of the Code of Tennessee, or a felony, conviction for which will render him infamous, or for which the maximum punishment is death, may or may not also charge that he is such habitual criminal, but in either case the felony charge shall be deemed and construed as necessarily including and charging such person with being an habitual criminal, and no such indictment or presentment shall be subject to any objection for failure to specifically include a charge that such person is an habitual criminal. (1939, ch. 22, sec. 5)

11863.6 Verdict.—When an indictment or presentment charges an habitual criminal with a felony, as above provided, and also charges that he is an habitual criminal, as provided in section 1 (11863.1), it shall only be necessary for the jury, upon conviction, to find, and its verdict shall be, "We, the jury, find the defendant guilty as charged in the indictment," and whereupon the court shall impose sentence as provided in section 2 (11863.2) of this act.

When an indictment or presentment only charges an habitual criminal with the commission of a felony which, upon conviction therefor, will render him infamous, or for which the maximum punishment is death, if the verdict of the jury shall be the general verdict, as above, sentence shall be imposed as now provided by law for the offense charged, but if the jury also find that the defendant is an habitual criminal, its verdict shall be that, "We the jury, find that the defendant is an habitual criminal and guilty, as charged

in the indictment," and whereupon, sentence shall be imposed as provided in section 2 (11863.2) hereof. (1939, ch. 22, sec. 6)

11863.7 Evidence of Prior Conviction.—In all cases where a person is charged under the provisions of this act with being an habitual criminal, the record, or records, of prior convictions of such person upon charges constituting felonies, whether they were such as to carry with them a judgment of infamy under the laws of this state, shall be admissible in evidence, but only as proof that such person is, in fact, an habitual criminal, as herein defined, and a judgment of conviction of any person in this state, or any other state, country or territory, under the same name as that by which such person is charged with the commission, or attempt at commission, of a felony under the terms of this act, shall be prima facie evidence that the identity of such person is the same. (1939 ch. 22, sec. 7.)

11863.8 Provisions Severable.—The provisions of this act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this act shall continue in full force and effect, it being the legislative intent now hereby declared, that this act would have been adopted even if such unconstitutional or void matter had not been included therein. (1939 ch. 22, sec. 8.)

APPENDIX "C"

Tenn. Code Sec. 11738. "Plea of Guilty.—Upon the plea of guilty, when the punishment is confinement in the penitentiary, a jury shall be impaneled to hear the evidence and fix the time of confinement, unless otherwise expressly provided by this Code."

APPENDIX "D"

Tenn. Code Sec. 11749. "Judge's Charge in Felonies.—On the trial of all felonies, every word of the judge's charge shall be reduced to writing before given to the jury, and no part whatever shall be delivered orally in any such case, but shall be delivered wholly in writing. Every word of the charge shall be written, and read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement."

Tenn. Code Sec. 11750. "Further Instructions Asked For.—If the Attorneys on either side desire further instructions given to the jury, they shall write precisely what they desire the judge to say further. In such case the judge shall reduce his decision on the proposition or propositions to writing, and read the same to the jury without one word of oral comment, it being intended to prohibit judges wholly from making oral statements to juries in any case involving the liberties and lives of the citizens."

Tenn. Code Sec. 11751. "Charges as to Different Grades of Offenses.—It shall be the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two or more grades or classes of offense may be included in the indictment, without any request on the part of the defendant to do so."

Petitioner here respectfully presents this his brief on the merits of his case with Appendix's "A" "B" "C" "D" and respectfully prays relief from the judgment and sentence of life imprisonment in the State Penitentiary, heretofore imposed upon him and in this proceeding challenged as void because rendered in violation of due process of law

under the 14th Amendment to the Constitution of the United States.

Respectfully presented:

In behalf of WILLIAM C. CHANDLER,
Petitioner,

By Counsel: EARL E. LEMING,
508 Empire Bldg.,
Knoxville, Tennessee,

and

Associate Counsel: JAS. P. BROWN,
508 Empire Bldg.,
Knoxville, Tenn.,

WARREN R. WEBSTER,
502 Empire Bldg.,
Knoxville, Tenn.,

CARL A. COWAN,
101½ West Vine Ave.,
Knoxville, Tenn.,

RUDOLPH V. MCKAMEY,
101½ West Vine Ave.,
Knoxville, Tennessee.

I, Earl E. Leming, Attorney for Petitioner, do hereby certify that I have this the 24th day of August, 1954, mailed a true carbon copy of the foregoing Brief On the Merits on Petitioners Petition for Certiorari to the Honorable Roy H. Beeler, Attorney General for the State of Tennessee, Attention Mr. Knox Bigham, Supreme Court Building, Nashville, Tennessee.